legality of such taxes is, as yet, unadjudicated. In a recent case, *In re Cummings' Estate*, 127 N. Y. Supp. 109 (Sup. Ct., App. Div.), a testator left personal property both in New York and California. The California property was administered there according to California law, the court deciding that the testator was domiciled in that state. Later, administration proceedings were instituted in New York, and that court determined that the deceased was domiciled in New York and that the personalty in California was consequently subject to a New York inheritance tax. It is difficult to see what is the basis for the New York tax. To be sure the determination of domicile by one court is not conclusive on another;[10] and where domicile is necessary for jurisdiction a judgment based on an erroneous adjudication of it need not be regarded by a sister state.[11] But in the principal case the domicile is not a jurisdictional fact, there being nothing to prevent a state from distributing property within its borders according to any law it pleases. It is uncontroverted that a distribution based on an erroneous determination of domicile cannot be disregarded in proceedings in another state.[12] Thus the California court has effectively distributed wholly in accordance with its own law, so that the only basis for a tax by the state of domicile — that it has furnished the law of distribution — seems lacking.

Even where personalty is administered according to the law of the testator's domicile the foundation for a tax by the state of the domicile seems rather fanciful. The sovereign of the *situs* has merely chosen to allow property within its jurisdiction to pass according to other principles of distribution than its own, and requires no actual co-operation for such a transfer to be effective. Though a number of states have upheld such taxes,[13] there are opinions which seem adverse to them.[14] While the Supreme Court of the United States has not passed upon the question,[15] it has recently shown itself opposed to double taxation, repudiating the fiction of *mobilia sequuntur personam*,[16] so that it seems not unlikely that it will hold such taxes illegal.

THE THEORY OF RESTRICTIVE AGREEMENTS AS TO A BUSINESS. — The principle is settled that equity will restrain the breach of an agreement between the grantor and the grantee, restricting the use of land, both by the grantee himself, and by all subsequent purchasers of the land with notice, whether or not an easement or a covenant running with the land is created.[1] But it is not agreed upon what theory this principle

[10] Overby *v.* Gordon, 177 U. S. 214.

[11] Andrews *v.* Andrews, 188 U. S. 14.

[12] Tilt *v.* Kelsey, 207 U. S. 43. See Overby *v.* Gordon, *supra*.

[13] *In re* Merriam, 141 N. Y. 479; Frotheringham *v.* Shaw, *supra*.

[14] See *In re* Joyslin's Estate, *supra*; Albany *v.* Powell, 2 Jones (N. C.) 51.

[15] Blackstone *v.* Miller, 188 U S. 189, has been referred to as supporting such a tax, and there is a *dictum* (p. 204) to that effect. Yet the decision merely upholds a tax by the st te of the *situs* where the state of domicile is also taxing.

[16] Union Transit Co. *v.* Kentucky, 199 U. S. 194, was revolutionary in overthrowing a tax by the state of domicile on foreign personalty, but New York, Central R. *v.* Miller, 202 U. S. 584, supported a tax on personalty periodically without the state but not subject to taxation elsewhere.

[1] Tulk *v.* Moxhay, 2 Ph. 774; Parker *v.* Nightingale, 6 All. (Mass.) 341; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206.

rests.[2] It has been suggested that this obligation is an analogy in equity either of the doctrine of negative easements,[3] or the doctrine of covenants running with the land. But these analogies are superficial merely, and too narrow to cover the results which the courts actually reach.[4] It must be recognized that this principle, which is purely equitable, a matter of the exclusive jurisdiction of equity, is not confined by any legal analogy, but is based on the broad principle that equity will carry out the intent of the parties. Where the parties by a valid agreement have expressed an intention to impose certain restrictions or servitudes upon the *res*, one who takes with notice of that agreement cannot equitably refuse to carry out that intent. "In such cases, although the covenant or agreement in the deed, regarded as a contract merely, is binding only on the original parties, yet, in order to carry out the plain intent of the parties, it will be construed as creating a right or interest in the nature of an incorporeal hereditament or easement . . . arising out of and attached to the land." [5]

On this theory, the form of the agreement is immaterial. An equitable servitude may be imposed by simple contract,[6] as well as by a covenant.[7] This view also explains the cases where the *res* is other than land. Thus it has been held that these servitudes may attach to personalty.[8] It has also been held that where an agreement has been made for the benefit of a business, the benefit of that covenant will attach to the business, and inure to a subsequent owner of that business.[9] And upon principle it would seem that likewise the burden of a restrictive servitude upon a business should bind a subsequent assignee with notice.[10]

The result in a recent English case, *Wilkes* v. *Spooner*, 24 T. L. R. 157 (Eng., K. B. D., Dec. 16, 1910), may be more logically explained on the above theory. A sold the plaintiff his business of general butcher, covenanting not to establish a rival business within three miles. A

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[2] Jessel, M. R., in London & South Western Ry. Co. *v.* Gomm, 20 Ch. Div. 562, 583, says that the doctrine of Tulk *v.* Moxhay, *supra*, is "either an extension in equity of the doctrine of Spencer's Case to another line of cases or else an extension in equity of the doctrine of negative easements." This statement has been cited in later English cases without a definite choice of either analogy. Rogers *v.* Hosegood, [1900] 2 Ch. 388, 404; *In Re* Nisbet & Pott's Contract, [1905] 1 Ch. 391, 397.

[3] These restrictions are called equitable easements in Peck *v.* Conway, 119 Mass. 546, 549; Trustees of Columbia College *v.* Lynch, 70 N. Y. 440, 446; Joy *v.* St. Louis, 138 U. S. 1, 38, 39. The New York case cited is criticized in DeGray *v.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, 339, where the obligation is founded on the ground of unjust enrichment which is the doctrine advocated by Dean Ames. See 17 HARV. L. REV. 174, 183.

[4] The objections to these analogies are set forth in the article in 17 HARV. L. REV. *supra*.

[5] *Per* Bigelow, C. J., in Whitney *v.* Union Ry. Co., 11 Gray (Mass.) 359, 364.

[6] Tulk *v.* Moxhay, *supra*.

[7] Luker *v.* Dennis, 7 Ch. D. 227; Trustees of Columbia College *v.* Lynch, *supra;* Kirkpatrick *v.* Peshine, *supra*.

[8] Murphy *v.* Christian Press Ass. Publishing Co., 38 N. Y. App. Div. 426. See 13 HARV. L. REV. 53; see New York Bank Note Co. *v.* Hamilton Bank Note Co., 28 N. Y. App. Div. 411, 424. *Contra*, Garst *v.* Hall & Lyon Co., 179 Mass. 588. For an article on Restrictive Covenants as to Patented Articles, see 10 HARV. L. REV. 1.

[9] John Brothers Abergarw Brewery Co. *v.* Holmes, [1900] 1 Ch. 188; Francisco *v.* Smith, 143 N. Y. 488.

[10] *Cf.* Standard American Publishing Co. *v.* Methodist Book Concern, 33 N. Y. App. Div. 409.

conducted a pork business at a nearby shop which he held on lease. This lease A surrendered in order that the defendant, his son, who bought the pork business with notice of this covenant, might get a new lease, and establish a business to rival the plaintiff's. The court enjoined the defendant on the ground that he had taken these premises with notice of the agreement which bound them. The court assumes almost without argument that this burden attached to the land, but it is difficult to see how a mere tenant for years could impose a restriction which would survive his lease. But furthermore it is submitted that this is not a true construction of what the parties intended, upon which, as a basis, this doctrine of equitable servitudes rests.[11] The purchaser of A's business had a much broader intent than merely to impose a servitude on this land. He intended to restrain A's rival business wherever A might attempt to establish it within three miles. A's business was, therefore, the *res* upon which this servitude was imposed. So the defendant, not as the occupant of these premises, but as the assignee of his father's business, is properly enjoined.[12]

RECENT CASES.

ADMIRALTY — TORTS — DAMAGES RECOVERABLE FROM ONE OF TWO VESSELS AT FAULT. — In a collision between vessels A and B in which both were at fault, the cargo on A was damaged. An action was brought, and both vessels were in court. The cargo-owner could probably recover nothing from A. *Held*, that he can recover from B only half of the amount of his damage. *The Drumlanrig*, [1911] A. C. 16.

This decision of the House of Lords affirms that of the Court of Appeal, discussed in 24 HARV. L. REV. 150.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — CONSTRUCTION OF CONTRACT FOR COMPENSATION. — An attorney contracted to prosecute a suit for a contingent fee of one third of the recovery. He sued on a *quantum meruit* for extra services in defending against a counterclaim. *Held*, that these services are within the contract. *Payne* v. *Davis County*, 129 N. W. 823 (Ia.).

Two rules for construing contracts by attorneys for taking cases seem to reconcile all the authorities. First, where the consideration is a contingent fee, the contract is construed to include all legal services necessary to a final and effective recovery. Such a contract includes opposing a petition of *certiorari*, after final judgment. *Tuttle* v. *Claflin*, 88 Fed. 122. And so services in an appeal. *Niagara Fire Ins. Co.* v. *Hart*, 13 Wash. 651. But *cf. In re Bowles*, 12 N. Y. Supp. 468. But services in a separate suit are not held included, even though necessary to the successful completion of the suit which the contract concerns. *Haines and Bishop* v. *Wilson*, 85 S. C. 338. See *Gorrell* v. *Payson*, 170 Ill. 213. Secondly, when the contract is for a fixed fee, it is held not to include unusual, though necessary, services. Such a contract does not include getting a *mandamus* to compel a rehearing. *Isham* v. *Parker*, 3 Wash. 755. Nor does

[11] See the quotation from Bigelow, C. J., in Whitney *v.* Union Ry. Co., *supra*.

[12] The whole subject of the theoretical basis of the enforcement of these restrictions is very carefully dealt with in 5 HARV. L. REV. 274, and 6 *id.* 280.